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NO. 91-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF ARIZONA,

Petitioner,

-vs-

TIMOTHY PRICE QUINTON,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Arizona Court of Appeals err in holding that this Court's decision in Grady v. Corbin bars prosecution of Quinton for the offense of first-degree murder following his prosecution for the offense of kidnapping where the state will not rely upon conduct that constitutes the kidnapping offense to prove an element of the first-degree murder offense?

2. Should this Court overrule its recent decision in Grady v. Corbin because it misinterprets and misapplies the double jeopardy clause of the fifth amendment and leads to inconsistent, unjust, and absurd results in other cases?

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OPINION BELOW

The State of Arizona seeks review of the Arizona Court of Appeals' opinion of February 19, 1991, holding that prosecution of respondent, Timothy Price Quinton (Quinton), for the offense of first-degree murder is barred by the double jeopardy clause of the fifth amendment of the United States Constitution. That opinion is reported at 815 P.2d 914 and is attached as Appendix A.

STATEMENT OF JURISDICTION

The opinion of the Arizona Court of Appeals was filed on February 19, 1991. (Appendix A.) The State of Arizona filed a petition for review of the opinion by the Arizona Supreme Court on March 19, 1991. The Arizona Supreme Court denied the state's petition for review by order dated September 13, 1991. (Appendix B.)

This Court has jurisdiction to review the opinion of the Arizona Court of Appeals pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the fifth amendment to the United States Constitution provides:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

The pertinent part of the fourteenth amendment to the United States Constituion provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATUTORY PROVISIONS INVOLVED

The pertinent part of the first-degree murder statute, A.R.S. § 13-1105(A), provides:

> A person commits first degree murder if:
>
> 1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or
>
> 2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, molestation of a child under § 13-1410, narcotics offenses under § 13-3408, subsection A, paragraph 7 or § 13-3409, kidnapping under § 13-1304, burglary under § 13-1506, 13-1507 or 13-1508, arson of an occupied structure under § 13-1704, robbery under § 13-1902, 13-1903 or 13-1904, escape under § 13-2503 or 13-2504 or child abuse under § 13-3623, subsection B, paragraph 1, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

The pertinent part of the kidnapping statute, A.R.S. § 13-1304(A), provides:

> A person commits kidnapping by knowingly restraining another person with the intent to:
>
> . . . .
>
> 3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony.

STATEMENT OF THE CASE

On a night in September 1989, 7-year-old Rebecca Lanning failed to return to her family's campsite on the bank of the Colorado River in Mohave County, Arizona; she had been seen with Quinton prior to her disappearance. (Appendix at A-5.) Rebecca's body was discovered in a dump 17 days later. (Id.) Quinton was arrested on October 7, 1989, and was indicted by a Mohave County Grand Jury for the offenses of kidnapping and custodial interference on October 26, 1989. (Id.) Quinton's trial was set for June 4, 1990. (Id.) On May 17, 1990, a Mohave County Grand Jury indicted Quinton for the offense of the first degree murder of Rebecca Lanning, "pursuant to A.R.S. § 13-1105." (Id. at A-5-6.) The indictment was not limited to a felony murder theory. (Id. at A-6 n.4.) Quinton was appointed different counsel

to represent him on the first-degree murder charge. (Id. at A-6-7.) The prosecutor discussed with counsel in both matters the possibility of consolidating the matters for trial; they opposed consolidation. (Id.) The prosecutor did not file a written motion to consolidate. (Id. at A-6.)

Quinton's trial on the kidnapping and custodial interference charges proceeded as scheduled and he was convicted of both offenses. (Appendix at A-7-8.) On August 8, 1990, Quinton filed a motion to dismiss the first-degree murder charge, arguing that principles of double jeopardy barred prosecution on the murder charge following his conviction for the offense of kidnapping. (Id. at A-7-8.) The trial court denied the motion to dismiss. (Id. at A-11.)

On October 30, 1990, Quinton filed a petition for special action in the

Arizona Court of Appeals claiming that the trial court "failed to perform a duty required by law or failed to exercise required discretion, acted without and, in excess of his legal authority, and acted in an arbitrary, capricious manner, and abused his discretion." The state filed a response contending that the double jeopardy clause of the fifth amendment, as interpreted by the Supreme Court in Grady v. Corbin, 495 U.S. ___, 110 S. Ct. 2084 (1990), did not bar prosecution of Quinton for the offense of first-degree murder and that, by opposing consolidation of the murder charge with the kidnapping and custodial interference claim, Quinton was precluded from raising a double jeopardy claim.

In its published opinion of February 19, 1991, the Arizona Court of Appeals accepted special action jurisdiction of Quinton's petition for

special action and granted the relief requested, ordering that the trial court dismiss the charge of first-degree murder pending against Quinton. (Appendix at A-27.) The court of appeals rejected the state's contention that Quinton had "waived" any claim of double jeopardy by way of his attorneys' representation that they would oppose a motion to consolidate the kidnapping charge with the first-degree murder charge. (Id. at A-13-17.) The court of appeals also held that principles of double jeopardy, as enunciated by this Court in Grady v. Corbin, barred the state from trying Quinton on the charge of first-degree murder. (Id. at A-18-27.) The state's petition for review to the Arizona Supreme Court was denied. (Appendix B.)

REASONS FOR GRANTING THE WRIT

I

The Arizona Court of Appeals Has Erred As a Matter of Federal Constitutional Law in Applying This Court's Decision in Grady v. Corbin, Resulting in an Erroneous Finding That Prosecution of Quinton for the Offense of First-Degree Murder Is Barred by the Double Jeopardy Clause of the Fifth Amendment.

II

The Court Should Overrule Its Recent Decision in Grady v. Corbin Because It Misinterprets and Misapplies the Double Jeopardy Clause of the Fifth Amendment and Leads To Inconsistent, Unjust, and Absurd Results in Other Cases.

ARGUMENTS

I

THE ARIZONA COURT OF APPEALS HAS ERRED AS A MATTER OF FEDERAL CONSTITUTIONAL LAW IN APPLYING THIS COURT'S DECISION IN GRADY V. CORBIN, RESULTING IN AN ERRONEOUS FINDING THAT PROSECUTION OF QUINTON FOR THE OFFENSE OF FIRST-DEGREE MURDER IS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

The Arizona Court of Appeals held that prosecution of Quinton for the first-degree murder of Rebecca Lanning is barred by the double jeopardy clause of the fifth amendment because "the second prosecution is dependent on the same conduct as the earlier prosecution." (Appendix at A-24.) The Arizona Court of Appeals stated that its holding was mandated by this Court's decision in

Grady v. Corbin. (Id. at A-18, A-22-25.) The Arizona Court of Appeals has clearly erred in interpreting and applying this Court's decision in Grady and, if the published opinion is not overruled, it will mislead countless appellate courts throughout the nation.

In Grady, this Court held:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. See Dowling v. United States, 493 U.S. ___, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).

110 S. Ct. at 2093. To be sure, the majority (5-4) decision in Grady leaves open "many questions [] and the answers

to all of them are ridiculous" and may well result in "high comedy but inferior justice." Id. at 2104 (Scalia, J., dissenting).[1] Nevertheless, for the time being, such is the current state of double jeopardy law.

At least two principles relative to the case at bar may be discerned from Grady: (1) in a subsequent prosecution the state is not precluded from utilizing or relying upon the same evidence or conduct

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1. At the conclusion of its opinion, the Arizona Court of Appeals states: "It is our understanding that the defendant has appealed his kidnapping and custodial interference conviction [sic]. If he is successful in that endeavor and the matter is sent back to the trial court for a new trial, the state may wish to try the murder case rather than the kidnapping case." (Appendix at A-27.) Thus, if the court of appeals' opinion stands, the state will have an impetus to have Quinton's kidnapping appeal succeed while Quinton will presumably desire to have his appeal fail. This is an example of the "delicious role-reversal" which Justice Scalia notes as making for "high comedy but inferior justice." 110 S. Ct. at 2104.

relied upon in the first prosecution, only the same conduct that constitutes the "first offense" if used to prove an "essential element" of the second offense; and, (2) the state is not barred, in a subsequent prosecution, from prosecuting offenses committed during the "same transaction" giving rise to the crimes tried in the first prosecution.[2]

In its opinion, the court of appeals started off on the right foot, stating:

> Under Grady, a subsequent prosecution is unconstitutional if, in order to establish an element of an offense, the

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2. The Court noted that it had "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." Grady v. Corbin, 110 S. Ct. at 2094 n.15, quoting, Garrett v. United States, 471 U.S. 773, 790 (1985). Indeed, the Court has never garnered more than two votes for the "single criminal act, occurrence, episode, or transaction" theory. See, e.g., Jones v. Thomas, 491 U.S. ___, 109 S. Ct. 2522, 2527 (1989) (Brennan, J., joined by Marshall, J., dissenting); Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (Brennan, J., joined by Marshall, J., dissenting).

> prosecution must prove conduct that constitutes an offense for which the defendant already has been prosecuted.

(Appendix at A-23, emphasis added.) The court began to veer off course in attempting to distinguish between "evidence" and "conduct":

> We should carefully distinguish between proving the same conduct in two prosecutions and using the same evidence in two prosecutions. The rule in Grady does not prohibit the prosecutor from introducing the same evidence in the second prosecution that was used in the first prosecution.

(Id. at A-24.) Finally, the court clearly erred in failing to recognize Grady's explicit holding that a second prosecution is barred only if the state must prove conduct that constitutes the first offense to prove an element of the second offense:

> However, if, as here, the second prosecution is dependent on the same conduct as the earlier prosecution, double jeopardy occurs.

(Id. at A-24, emphasis added.) The above

statement does no more than say that the state will present the same evidence in the second prosecution.[3]

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3. In Grady, this Court did not purport to fashion a double jeopardy "exclusionary rule." In other words, the Court did not hold that evidence or conduct presented at the first prosecution is somehow "excluded" or "precluded" from admission during the subsequent prosecution. Rather, the double jeopardy clause is a bar to a subsequent prosecution "for the same offence." U.S. CONST., amend. V. Once the trial court makes a threshold determination that there is no double jeopardy bar, all evidence and conduct admitted during the first prosecution may be admitted by the state at the subsequent prosecution to prove its case:

> This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. See Dowling v. United States, 493 U.S. ____, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).

Grady v. Corbin, 110 S. Ct. at 2084 (emphasis added, footnote omitted).

The state is not barred from presenting evidence or conduct presented during a prior prosecution. Grady v. Corbin, 110 S. Ct. at 2093. Rather, the state is only precluded from proving the "conduct" constituting the offense of kidnapping "to establish an essential element" of first-degree murder. Id., see also, United States v. Clark, 928 F.2d 639, 642 (4th Cir. 1991) (Grady prohibits a successive prosecution only if the evidence of the previously prosecuted conduct proves the "entirety" of an essential element of the subsequent prosecution); United States v. Calderone, 917 F.2d 717, 724 (2d Cir. 1990) (Newman, Circuit Judge, concurring) (Grady bars a successive prosecution only when the conduct prosecuted at the first trial is or may constitute the "entirety" of an essential element of the offense at the second trial). The state is not

barred from presenting evidence, or "conduct," even though that conduct occurred during the same transaction giving rise to the charge of kidnapping. Grady v. Corbin, 110 S. Ct. at 2094 n.15. Indeed, in Grady the Court explicitly stated:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted - driving while intoxicated and failing to keep right of the median - to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution, and the New York Court of Appeals properly granted respondent's petition for a writ of prohibition. This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence).

Id. at 2094 (emphasis added).

In its opinion, the Arizona Court of Appeals makes much of the fact that the state's theory at the kidnapping/custodial interference trial was that "the defendant took the child against her will with the intent to kill her." (Appendix at A-25.) Such is simply irrelevant in conducting a double jeopardy analysis for, at most, the state's theory implicates the "single criminal act, occurrence, episode, or transaction" view which this Court has "steadfastly refused to adopt." Grady v. Corbin, 110 S. Ct. at 2094 n.15. The same applies to the court of appeals' statement that "[t]he facts presented to each grand jury to obtain both indictments were virtually identical."[4]

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4. The grand jury transcripts were not in the record before the court of appeals in ruling on the petition for special action. The only reference to the grand jury evidence was by Quinton's counsel at

Continued . . .

(Appendix at A-6, emphasis added.) Thus, in holding that prosecution of Quinton for the murder of Rebecca Lanning is barred, the Arizona Court of Appeals has implicitly applied the "same transaction" rule. Its holding is contrary to the double jeopardy clause and the express command of Grady.

To prove the offense of first-degree murder, the state will not have to prove Quinton's kidnapping of Rebecca Lanning

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Footnote 4, continued:

the August 21, 1990, argument on the motion to dismiss wherein she stated that the evidence presented to both grand juries was "substantially the same." As previously noted, Quinton was indicted "pursuant to A.R.S. § 13-1105." (Appendix at A-5-6.) In the event Quinton believes that the evidence presented to the grand jurors supports only a probable cause finding for felony murder with kidnapping as the underlying felony, his remedy would be to file a motion for new finding of probable cause pursuant to Rule 12.9, Arizona Rules of Criminal Procedure. At any rate, that issue is not before the Court.

to prove an "element" of the offense since the state may prove first-degree murder by proving that, "[i]ntending or knowing that his conduct will cause death, [Quinton] cause[d] the death of [Rebecca Lanning] with premeditation." A.R.S. § 13-1105(A)(1). Additionally, the state would be free to proceed on a "felony murder" theory, provided that kidnapping is not the underlying felony. See A.R.S. § 13-1105(A)(2). The state conceded that it is barred from proceeding on the theory that Quinton is guilty of the first-degree murder of Rebecca Lanning by committing or attempting to commit the offense of "kidnapping" since the state would be required to prove conduct constituting an offense for which Quinton has previously been tried and convicted "to establish an essential element" of the first-degree murder charge. Grady v. Corbin,

110 S. Ct. at 2093 (emphasis added). This, however, is the extent of the double jeopardy bar.

The Arizona Court of Appeals is clearly incorrect in its conclusory statement that "[t]he state has not only not shown that it will rely on different conduct to prove that the defendant murdered Rebecca Lanning; it has conceded that it will not." (Appendix at A-25.) The state has charged Quinton with first-degree murder "pursuant to A.R.S. § 13-1105"; the state has not, by any means, limited the charge to "felony murder" with "kidnapping" as the underlying felony. Thus, the state has not made the fatal mistake made by the State of New York in its "bill of particulars" in Grady. See Grady v. Corbin, 110 S. Ct. at 2094. The state will not rely upon a kidnapping felony murder theory in prosecuting Quinton for the murder of Rebecca Lanning.

Therefore, the prosecution is not barred by principles of double jeopardy, as enunciated by this Court in Grady. The Arizona Court of Appeals erred as a matter of federal constitutional law in holding that the prosecution is barred.

II

THIS COURT SHOULD OVERRULE ITS RECENT DECISION IN GRADY V. CORBIN BECAUSE IT MISINTERPRETS AND MISAPPLIES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND LEADS TO INCONSISTENT, UNJUST, AND ABSURD RESULTS IN OTHER CASES.

Since the Arizona Court of Appeals has clearly erred in its application of this Court's recent decision in Grady, the Court may elect to simply grant certiorari on the first issue raised by petitioner and need not reach this second issue. However, in the event the Court determines that the Arizona Court of

Appeals correctly applied Grady v. Corbin, or if the Court simply desires to seize the opportunity to do so, petitioner respectfully submits that Grady was wrongly decided and should be overruled as swiftly as possible. The Court's decision in Grady misinterprets constitutional text, is inconsistent with longstanding historical evidence and judicial case law, and has resulted in inconsistent, unjust, and absurd results in other cases and will doubtlessly continue to do so in the future.

The double jeopardy clause of the fifth amendment, made applicable to the states through the fourteenth amendment, provides that no person shall "be subject for the same offence to be twice placed in jeopardy." U.S. CONST., amend. V; see also Lockhart v. Nelson, 488 U.S. 33, 38 (1988). The double jeopardy clause affords a criminal defendant protection

against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 494, 498 (1984).

Thus, by its plain wording, the double jeopardy clause prohibits successive prosecutions or multiple punishment "for the same offence" -- not for the same act, not for the same conduct, and not for the same transaction. With all due respect, petitioner submits that the Court has engaged in judicial slight-of-hand in holding that the double jeopardy clause bars the prosecution from proving "conduct that constitutes an offense for which the defendant has already been prosecuted" to prove an "essential element" in a subsequent prosecution. Grady v. Corbin, 110 S. Ct. at 2093.

Rather than plagiarize, petitioner will simply refer the Court to Justice Scalia's thorough review of historical evidence and early post-constitutional case law set forth in his dissent in Grady v. Corbin, 110 S. Ct. at 2098-2101 (Scalia, J., dissenting). Suffice it to say that, for a number of years, the "identical statutory elements" test of Blockburger v. United States, 284 U.S. 299 (1932), was the "established test" for defining the "same offence" under the double jeopardy clause. Brown v. Ohio, 432 U.S. 161, 166 (1977); see also Gore v. United States, 357 U.S. 386, 392 (1958); American Tobacco Co. v. United States, 328 U.S. 781, 788-89 (1946).

The Blockburger test focuses upon the statutory elements of the offenses:

> The applicable rule is that where the same act or transactions constitutes a violation of two distinct statutory provisions, the test to be applied to determine

> whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . A single act may be an offense against two statutes: and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

284 U.S. at 304 (citations omitted, emphasis added). If each statutory offense requires proof of a fact the other does not, the Blockburger test is satisfied "notwithstanding a substantial overlap in the proof offered to establish the crimes." Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

This Court's first departure from the exclusivity of Blockburger in resolving double jeopardy claims appears to have occurred in Ashe v. Swenson, 397 U.S. 436 (1970), wherein the Court held that the principle of "collateral estoppel" is "embodied in the Fifth Amendment

guarantee against double jeopardy." 397 U.S. at 443-45. The principle of collateral estoppel (issue preclusion) precludes the prosecution from relitigating factual issues necessarily resolved in the defendant's favor in the first prosecution; however, if the record reveals any other issue upon which a rational jury could have grounded its verdict the issue has not been necessarily resolved against the prosecution and may be relitigated in a subsequent prosecution. Id. at 444.[5]

The second departure from the strict application of Blockburger in double jeopardy analysis -- albeit a limited one -- is the situation where a defendant is

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5. Petitioner does not agree that a relitigation of factual issues places a defendant in jeopardy "for the same offence." Nevertheless, petitioner does not challenge the Court's holding in Ashe v. Swenson.

successively prosecuted for a greater or lesser offense of the offense originally prosecuted. See Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977); Brown v. Ohio, 432 U.S. at 167-69. In Harris v. Oklahoma, strict application of the Blockburger "identical elements" test did not bar the second prosecution because felony murder could be established by proof of "any felony," not only the felony charged in the second prosecution. See Grady v. Corbin, 110 S. Ct. at 2092-93. In light of the prosecution's concession that the underlying felony proven at the felony murder trial was the same felony for which the defendant was subsequently charged, tried, and convicted, the Court, in a per curiam decision, held that "the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater crime." Harris v. Oklahoma,

433 U.S. at 682. In Brown v. Ohio, the Court held that a lesser-included and a greater offense are the "same offense" under Blockburger. 432 U.S. at 168-69.

The Court began to plow new double jeopardy ground by way of the following dicta in Illinois v. Vitale, 447 U.S. 410, 420 (1980):

> [I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown [v. Ohio] and our later decision in Harris v. Oklahoma, 433 U.S. 682 (1977).

Finally, in Grady v. Corbin, the Court relying heavily on the above-quoted dicta in Vitale, held:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish

> an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

110 S. Ct. at 2093 (emphasis added). The Court's holding is inconsistent with the plain wording of the double jeopardy clause, historical evidence, and early post-constitutional judicial case law interpreting and applying the double jeopardy clause.

Furthermore, the Court's decision in Grady is inconsistent with the Court's holding in Dowling v. United States, 493 U.S. ___, 110 S. Ct. 668 (1990) -- decided the same term as Grady. In Dowling, the prosecution offered evidence of a prior attempted robbery, for which the defendant had been tried and acquitted, to prove identity -- an "essential element" in a subsequent bank robbery prosecution. 110 S. Ct. at 670. The Court held that admission of this

conduct did not violate the double jeopardy clause of the fifth amendment. Id. at 671-74. As pointed out in both dissents in Grady, Dowling cannot be reconciled with the majority holding in Grady. 110 S. Ct. at 2095-96 (O'Connor, J., dissenting), 110 S. Ct. at 2102 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting).

Petitioner is well aware of this Court's hesitance to overrule precedent. The Court recently stated that "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity integrity of the judicial system." Payne v. Tennessee, 501 U.S. ___, 111 S. Ct. 2597, 2609 (1991). The Court further noted that "Stare decisis is not an inexorable

command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" Id. at 2609-10, quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940). The Court stated that "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" Id. at 2609, quoting Smith v. Allwright, 321 U.S. 649, 665 (1944). The necessity of overruling wrongly decided precedent is especially compelling "in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" Id. at 2610, quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). Grady v. Corbin is just such a case.

As noted above, the Court's holding in Grady is poorly reasoned and contrary to

the plain wording of the double jeopardy clause of the fifth amendment, as well as prior Court precedent. That alone is reason enough to overrule the decision. Payne v. Tennessee, 111 S. Ct. at 2609. Moreover, by misinterpreting a constitutional provision, there exists no possibility of "correction through legislative action." Id. at 2610. In addition, the Court's interpretation of the double jeopardy clause is "unworkable," unpredictable in application, and damages the "actual and perceived integrity of the judicial system." Id. at 2609.

Petitioner's research has disclosed numerous state and federal court decisions attempting to interpret and apply Grady. The results reached are, by and large, confusing and inconsistent. For example, in Commonwealth v. Kline, 592 A.2d 730 (Pa. Super. 1991), the court

held that Grady barred prosecution for the offense of driving while under the influence of alcohol (DWI) after the defendant signed and mailed a traffic citation for driving on the wrong side of the road arising from the same transaction because, in the Pennsylvania appellate court's opinion, the Commonwealth would have to "prove" that the defendant crossed the center line of the roadway to establish intoxication -- despite the fact that the arresting officer saw the defendant's vehicle "weaving" and noted that the defendant exhibited "indicia of alcohol." 592 A.2d at 734.[6]

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6. In affirming the trial court's dismissal of the DWI charge, the court criticized this Court's decision in Grady:

> We note further that our holding today would appear to stretch the double jeopardy guarantee to

Continued . . .

Similarly, in Glasser v. State, 590 A.2d 171 (Md. App. 1991), the Court of Special Appeals of Maryland held that the paying of a $35 fine for the traffic offense of driving the wrong way on a one-way street barred prosecution of the defendant for the offenses of manslaughter by automobile and homicide by motor vehicle while intoxicated arising from the same transaction, because the prosecutor "averred" that "the fatal collision occurred as [the

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Footnote 6, Continued:

> beyond the limits likely to have been contemplated by the authors of the Fifth Amendment. It is difficult to view this defendant's mere signing and mailing of the traffic citation as the kind of ordeal against which the double jeopardy guarantee was meant to protect. Moreover, the instant case displays none of the prosecutorial overreaching which in part underlies the prohibition against multiple prosecutions.

592 A.2d at 734.

defendant] travelled in the wrong direction on the beltway." 590 A.2d at 173; see also Harrelson v. State, 569 So. 2d 295 (Miss. 1990) (aggravated assault convictions reversed under Grady because defendant paid traffic fine for driving on the wrong side of the road and state relied, in part, on the same conduct to prove aggravated assaults).

On the other hand, the Texas appellate courts have interpreted and applied Grady in an entirely different manner. In State v. Garcia, 810 S.W.2d 241 (Tex. App. 1991), the trial court, pursuant to Grady, dismissed a charge of DWI following the defendant's conviction for running a red light arising from the same transaction. 810 S.W.2d at 240. The Court of Appeals of Texas reinstated the charge holding that the trial court had misapplied Grady because "driving," while an element of each offense, is not

"conduct that constitutes an offense." Id. at 241.

In State v. Hensley, 810 S.W.2d 20 (Tex. App. 1991), the trial court dismissed a DWI charge pursuant to Grady because the defendant had previously been convicted of "failure to maintain a single marked lane" arising out of the same transaction. 810 S.W.2d at 20-21. The appellate court reversed the trial court's ruling and reinstated the DWI charge, holding that since the defendant's failure to drive within a single lane was not an "element" of DWI, Grady did not bar the DWI prosecution. Id. at 21. See also Kvetinkas v. State, 809 S.W.2d 914 (Tex. App. 1991) (conviction for speeding does not bar DWI prosecution under Grady because, while the defendant's intoxication may have contributed to the speeding offense, state does not have to prove speeding to make its case).

Recently, the Arizona Supreme Court has held that Grady does not apply to "traffic violations" because, under Arizona law, they are "civil" in nature and do not amount to "prosecutions":

> Defendant in the instant case contends that because Corbin was charged and sentenced for a traffic "infraction" (failure to keep right of the median) under New York law, the holding in Grady should be extended to criminal prosecutions following civil proceedings in Arizona. Whatever the relative merits of this foray into the intricacies of New York law, we believe that defendant and the court of appeals read Grady too expansively.

Taylor v. Sherrill, 98 Ariz. Adv. Rep. 17, 20 (Oct. 24, 1991). The court stated that this Court's decision in Grady "was premised on the assumption that a prior prosecution occurred." Id. Since traffic violations are civil in nature under Arizona law, the court held that Grady is inapplicable and jeopardy does not attach. Id.

Thus, states that designate traffic violations as civil in nature can avoid the double jeopardy bar enunciated in Grady, while states that designate the same conduct misdemeanors or petty criminal offenses (and presumably afford alleged violators greater rights) run into the Grady double jeopardy bar in subsequent criminal prosecutions. Such a result, besides being illogical, makes a mockery of the double jeopardy clause. As aptly stated by Justice Scalia:

> Even if we had no constitutional text and no prior case-law to rely upon, rejection of [Grady] is adequately supported by the modest desire to protect our criminal legal system from ridicule.

Grady v. Corbin, 110 S. Ct. at 2104 (Scalia, J., dissenting).

The state courts are not alone in their confusion over Grady. The federal courts are likewise stymied. In United States v. Felix, 926 F.2d 1522 (10th Cir.),

cert. granted, 60 U.S.L.W. 3257 (1991),[7] the Tenth Circuit, in a 2-1 decision, held that a defendant convicted of one count of attempting to manufacture methamphetamine in the United States District Court for the Western District of Missouri could not, pursuant to Grady, later be prosecuted for the offenses of

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7. The Court granted the Government's petition for writ of certiorari on the following questions:

> (1) May defendant be prosecuted for conspiracy to violate several narcotics statutes after previously having been prosecuted for conduct alleged in some of overt acts of conspiracy charge? (2) Is prosecution of defendant for narcotics offenses in connection with operation of narcotics laboratory in Oklahoma barred because he was previously prosecuted for attempting to set up narcotics laboratory in Missouri, in case in which evidence of his conduct with respect to Oklahoma laboratory had been introduced in Missouri - prosecution as evidence of his intent to commit Missouri offense?

60 U.S.L.W. 3218.

conspiracy, manufacture, and possession with intent to distribute methamphetamine in the United States District Court for the District of Oklahoma. 926 F.2d at 1523-24. The majority held that the second prosecution was barred by Grady because it "aris[es] from virtually the same conduct involving the same actors and overlapping time frames." 926 F.2d at 1528.[8]

Similarly, in United States v. Calderone, 917 F.2d 717 (2d Cir.

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8. In his dissent, Judge Anderson criticizes the majority for overlooking the plain language of this Court's decision in Grady and adopting a "dangerously broad interpretation of the Double Jeopardy Clause." 926 F.2d at 1532 (Anderson, J., dissenting). Specifically, Judge Anderson points out that the majority fails to recognize that Grady does not establish a per se "same conduct" rule -- rather, it bars a subsequent prosecution only where the prosecution will necessarily rely upon conduct that constitutes an offense for which the defendant has already been prosecuted to prove an "essential element" of the subsequent offense. Id. at 1532-33.

1990), cert. pending, the Second Circuit, in a 2-1 decision, held that defendants prosecuted for a "wide-ranging, multi-drug" conspiracy involving, among other things, the importation of heroin from Europe into the United States could not, pursuant to Grady, be prosecuted for a smaller conspiracy involving the distribution of heroin within the New York metropolitan area because the Government intended to prove the "same conduct" (overt acts) to prove the existence of the "agreement" (conspiracy) to distribute heroin. 917 F.2d at 718-19, 721. The majority also held that prosecution for the offenses of possession of heroin with intent to distribute and using a telephone to facilitate narcotics crimes was barred because the defendants were "prosecuted for the conduct that supports these

offenses." Id. at 722 (emphasis in original in part, added in part).

On the other hand, the Third and Fourth Circuits have interpreted and applied Grady in an entirely different manner. In United States v. Clark, 928 F.2d 639 (4th Cir. 1991), the Fourth Circuit held that Grady did not bar prosecution for the offenses of conspiracy to possess for distribution and conspiracy to distribute cocaine and heroin following the defendant's convictions for the offenses of possession of cocaine and heroin with the intent to distribute -- despite the fact that the conduct constituting the offenses for which the defendant was previously prosecuted was alleged as an "overt act" in the conspiracy prosecution. 928 F.2d at 641-42. The Fourth Circuit held that the "previously prosecuted conduct" (overt act) was not an "essential element" of the conspiracy

charges and that proof of that conduct did not prove the "entirety" of an "essential element," but "merely tends to prove an essential element." Id. at 642.

Similarly, in United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 111 S. Ct. 2011 (1991), the Third Circuit held that Grady did not bar the defendant's prosecution for the offense of conspiring to participate and participating in the affairs of an enterprise through a pattern of racketeering (RICO), despite the fact that the defendant had been previously prosecuted for an extortion offense which was alleged as a "predicate offense" in the subsequent RICO prosecution. 910 F.2d at 1109-11. The Third Circuit held:

> We believe that Scarfo reads Grady too broadly, as the reasoning in that decision logically extends only to offenses arising from a

> single discrete event. We do not think that the Supreme Court meant to imply that the double jeopardy clause forecloses successive prosecutions in cases of compound-complex felonies such as RICO, which involve several criminal acts occurring at different times in different places.

Perhaps the Third Circuit is correct in its limited reading of Grady, perhaps it is wrong -- who knows? This is exactly the type of confusion Grady has created and will continue to create unless and until it is overruled.

There are literally scores of additional state and federal court decisions futilely attempting to interpret and apply Grady. Suffice it to say that the state and federal judiciary have not been successful in giving meaning to a meaningless decision; a decision unsupported by constitutional text, inconsistent with longstanding historical evidence and judicial case

law, and a decision which invariably leads to inconsistent, unjust, and absurd results. Therefore, if this Court is inclined to salvage respect for our nation's criminal legal system and, more specifically, the double jeopardy clause of the fifth amendment, the Court should seize the opportunity to overrule Grady, as well as the dicta in Illinois v. Vitale relied upon by the majority in Grady.

CONCLUSION

The Arizona Court of Appeals has erred as a matter of federal constitutional law in holding that the double jeopardy clause of the fifth amendment of the United States Constitution, as interpreted by this Court in Grady v. Corbin, bars the State of Arizona from prosecuting Quinton for the offense of first-degree murder because the state will not prove conduct constituting the

previously prosecuted offense of kidnapping to prove an essential element of the offense of first-degree murder. Therefore, this Court should grant the petition for writ of certiorari, not only to correct the court of appeals' misapplication of federal constitutional law in this particular case, but also to foreclose other state and federal courts from relying upon the erroneous decision in countless future cases.

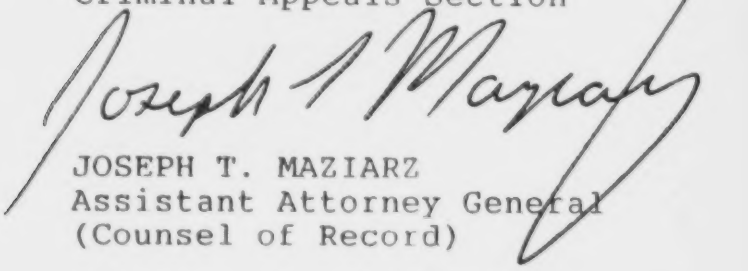
Additionally, this Court should seize the opportunity to overrule its recent decision in Grady v. Corbin because it misinterprets and misapplies the double jeopardy clause of the fifth amendment, is unsupported by the text of the fifth amendment, is inconsistent with longstanding historical evidence and judicial case law, and invariably leads to inconsistent, unjust, and absurd

results in other cases. Therefore, this Court should grant certiorari to overrule Grady.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section



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CERTIFICATE OF SERVICE

THREE COPIES of this Brief were deposited for mailing this 9th day of January, 1992, to:

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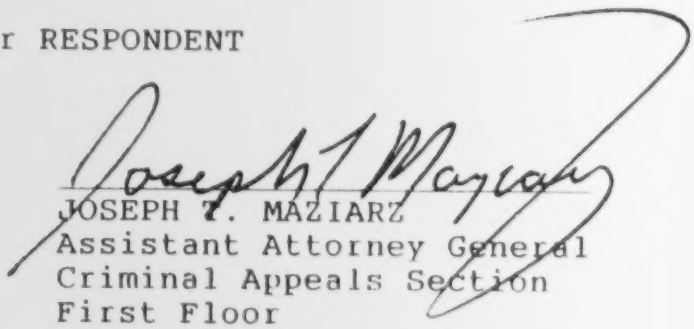

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APPENDICES

APPENDIX A

[Filed February 19, 1991]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TIMOTHY PRICE QUINTON, Petitioner, v. SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Mohave, THE HONORABLE LEONARD C. LANGFORD, a judge thereof, Respondent Judge, WILLIAM J. EKSTROM, JR., Mohave County Attorney, Real Party in Interest.	)	1 CA-SA 90-224 DEPARTMENT E O P I N I O N

Appeal from the Superior Court of
Mohave County

Cause No. CR-11525

The Honorable Leonard C. Langford, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

M. Ruth O'Neill
Mohave County Legal Defender
Attorney for Petitioner Kingman

William J. Ekstrom, Jr.,
Mohave County Attorney
by Robert R. Moon,
Deputy County Attorney
Attorneys for Real Party
in Interest Kingman

Grant Wood, Attorney General
by Paul J. McMurdie
Chief Counsel, Criminal Division
Attorneys for
Respondent Phoenix

C L A B O R N E, Judge

Timothy Price Quinton (defendant) was indicted for kidnapping and custodial interference, convicted by a jury, and sentenced to thirty years in prison. Before sentencing, but after this first indictment, the defendant was indicted for first degree murder and is awaiting trial on that charge. Defendant claims that the subsequent murder prosecution violates his state and federal

constitutional double jeopardy rights[1] because the victim and the conduct involved in the kidnapping[2] are the same victim and the same conduct to be proved in the prosecution of the first degree murder case. Defendant moved to dismiss the murder prosecution on this sole ground. The trial court denied the motion. Defendant now brings this special action.

There is no right of appeal from the denial of a motion to dismiss a

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[1] Constitution of the United States, Amendment V:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . .

Arizona Constitution, Art. 2, § 10:

> No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

[2] We will not refer to the custodial interference since it is not involved in this issue.

prosecution. See State v. Whitney, 108 Ariz. 277, 278, 496 P.2d 138, 139 (1972); Amos v. Bowen, 143 Ariz. 324, 327, 693 P.2d 979, 982 (App. 1984). For this reason, we accept jurisdiction of this special action. Nelson v. Roylston, 137 Ariz. 272, 273, 669 P.2d 1349, 1350 (App. 1983).[3] See Rules 3(c) and 8(a), Arizona Rules of Procedure for Special Actions. For the reasons set forth, we grant relief.

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[3] See also Abney v. United States, 431 U.S. 651, 659, 97 S. Ct. 2034, 2040, 52 L. Ed. 2d 651 (1977). In Abney, the Supreme Court held that denial of a motion to dismiss based on double jeopardy grounds constitutes a "final decision" and is immediately appealable. The Court reasoned that:

> if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Id. at 662.

FACTS

Rebecca Lanning did not return to her family's campsite on the bank of the Colorado River in Mohave County on a night in September of 1989. She had been seen with the defendant before her disappearance. Her dead body was discovered in a dump some seventeen days later. The defendant was arrested on October 7, 1989. On October 26, 1989, a Mohave County Grand Jury indicted and charged him with kidnapping and custodial interference. The defendant's trial was to commence on June 4, 1990.

On May 17, 1990, the Mohave County Grand Jury indicted the defendant and charged him with the first degree murder of Rebecca Lanning pursuant to A.R.S.

§ 13-1105.[4] The facts presented to each grand jury to obtain both indictments were virtually identical. When the defendant was arraigned on the murder charge on May 25, 1990, both the trial court and the prosecutor were informed that the private attorneys representing defendant on the kidnapping and custodial interference charges would not be defending him on the first degree murder charge. Although there was some

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[4] A.R.S. § 13-1105 reads as follows:

A. A person commits first degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons such person commits or attempts to commit . . . kidnapping under § 13-1304, . . . and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

discussion between the Mohave County Attorney's office and the public defender's office, which had been assigned to defend the defendant on the murder charge, about a continuance of the June 4 trial date or a consolidation of the two indictments, no formal motions were filed. The defendant was tried for kidnapping on June 4, 1990.

The state's case concerning the kidnapping of Rebecca Lanning was circumstantial. Its two main ingredients were (1) the defendant was seen with Rebecca Lanning before her disappearance and (2) she was later found dead. The state's theory under the kidnapping statute, A.R.S. § 13-1304, was that the defendant knowingly restrained Rebecca Lanning with the intent to inflict

death.[5] The state proved the death of the child, introduced pictures of her body, and argued that the defendant had killed her. The jury convicted the defendant of kidnapping. The trial court sentenced him to thirty years in prison.

After the sentencing, the public defender moved to dismiss the murder indictment on the grounds of double jeopardy. During the oral argument on the motion to dismiss, the following

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[5] A.R.S. § 13-1304 provides:

A. A person commits kidnapping by knowingly restraining another person with the intent to:

* * *

3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony;

* * *

colloquy between the deputy county attorney and the trial court occurred:

> THE COURT: Okay. Mr. Moon, I had a question. Do you agree that your evidence at the murder trial will be basically a replay of the evidence at the other trial?
>
> MR. MOON: It would be a lot of replay; however, some of the things that were precluded in the kidnapping trial I would hope to be able to get admitted into the murder trial. In addition, there was some knew [sic] information we received about halfway through the kidnapping trial about a statement allegedly made by the Defendant, and in fact I had rested when the information came to my -- came to me and I would have had to try to reopen my case in chief to present this; and that again turned out to be maybe not as crystal clear as it was initially reported to me -- seems like everything in this case has been that way --but there would be -- just about everything I presented in the first case would be presented again, and hopefully there would be some additional evidence. One other procedure --
>
> THE COURT: Just a second. The items you said were precluded, these are matters you wanted to present at the kidnapping trial, and so it sounds like it's just evidence that you used at the kidnap trial would be the only

evidence that would be presented at the murder trial plus in addition evidence that you tried to get in at the kidnapping trial but couldn't. Doesn't sound like you'll have anything different in the way of evidence than what you used or wanted to use in the kidnap trial other than the --

MR. MOON: Other than the one item that came to my attention after I had rested.

THE COURT: That's something you wanted to use at this -- at the kidnapping trial but it was too late?

MR. MOON: It was too late. Of course, I didn't know about it until it was too late, that's correct.

THE COURT: So the scenario that this murder trial, if it goes on, is going to be the same as last time except the judge just goes through and pulls out the -- puts in a murder instruction, takes out the one defining custodial interference and kidnapping.

MR. MOON: Well, that would be close to an accurate description, that is true, your Honor. The evidence that was precluded at the first trial was precluded because it pertains more to a murder charge, and Judge Pope ruled that it would be too prejudicial in a case where he was not charged with murder. That was -- it wasn't for

> any search and seizure issues or anything along those lines. (Emphasis added.)

Clearly, the state intended not only to present basically the same evidence in the murder case, but also the conduct to be presented was going to be the same.

The trial court denied the motion and further found that even if the Double Jeopardy Clause were applicable, the defendant's counsel in the kidnapping matter and counsel in the murder case opposed consolidation of these charges at the trial which commenced on June 4, 1990.

DISCUSSION

The state's response to the contention that the first degree murder prosecution violates the double jeopardy rights of the defendant is twofold. First, the state contends that the claim of double jeopardy may be waived, and that the acts

of defense counsel in failing to agree to a continuance or a consolidation of the two indictments constituted a waiver. There is no disagreement that the basis of this argument is the conversation between the prosecutor and the attorneys representing the defendant on both the kidnapping and the murder charges. The state did not file a formal motion to continue or to consolidate. Nor does the record indicate that the court or the defendant knew of the state's verbal request to consolidate before the kidnapping trial.

Second, the state contends that the prosecution for kidnapping is not the "same offense" within the meaning of the double jeopardy prohibition. We disagree with both contentions.

A. Did the Defendant Waive His Double Jeopardy Rights by Not Agreeing to a Consolidation of the Two Indictments ?

Our courts have long held that we should indulge every reasonable presumption against a waiver of a fundamental constitutional right. See Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938); State v. Anderson, 96 Ariz. 123, 131, 392 P.2d 784, 790 (1964). Just as well-recognized is the definition of waiver: the intentional relinquishment or abandonment of a known right. Anderson, 96 Ariz. at 131, 392 P.2d at 790. In dealing with waivers of constitutional rights in criminal cases, the defendant's waiver must be voluntarily, knowingly and intelligently made. See United States v. Cochran, 770 F.2d 850, 851 (9th Cir. 1985). See

also State v. Superior Court, 105 Ariz. 553, 555, 468 P.2d 580, 582 (1970). Finally, because of the importance of the right being waived, the waiver must be express rather than implied. Menna v. New York, 423 U.S. 61, 62-63, 96 S. Ct. 241, 242, 46 L. Ed. 2d 195 (1975).

Yet, the first question we must address is whether the defendant even had an opportunity to waive his double jeopardy right in the first instance. The record is confusing. The trial court's minute entry denying the defendant's motion to dismiss indicates that "Defendant's counsel in cause number CR-11399, the kidnapping and custodial interference matter, and counsel in cause number CR-11525, the murder case, opposed the consolidation of these charges at the trial which commenced June 4, 1990, before Judge Pope in cause number

CR-11399." The affidavit of the deputy county attorney who was responsible for the prosecution of both cases reveals that the issue of consolidation and a continuance was informally discussed with the attorneys representing the defendant in both cases.[6] The record also

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AFFIDAVIT

STATE OF ARIZONA)
)
COUNTY OF MOHAVE)

ROBERT R. MOON, being first duly sworn, deposes and says:

1. I am a Deputy Mohave County Attorney, licensed to practice law in the State of Arizona.

2. I represented the State in the prosecution of TIMOTHY PRICE QUINTON in Mohave County Superior Court No. CR-11399 and CR-11525.

3. On or near the date of the issuance of the Indictment in CR-11525, for First Degree Murder, I spoke with M. Ruth O'Neill, W. Joseph Wilkinson and Wayne Floyd, in separate conversations, about the possibility of consolidating the two

(continued...)

reveals that the prosecutor failed to undertake the procedure -- a motion -- that would require a formal response by the defendant and some action by the court. Only by formally presenting the motion to the court could the prosecution put the defendant to the necessity of registering a position in open court to which appropriate consequences would attach. Because the state did not do so, no choice was given the defendant, and no

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[6](continued...)

pending cases for trial. Mr. Floyd and Mr. Wilkinson advised me that they would not be representing the defendant against the murder charge, nor would they agree to continuing the trial in CR-11399 to consolidate the murder and kidnapping charges for trial even if Ms. O'Neill joined the defense team.

Ms. O'Neill advised me that she would not be prepared to try the murder case on June 4, 1990, nor would she be interested in consolidating the charges and trying the case as co-counsel with Floyd and Wilkinson.

(S) ROBERT R. MOON
ROBERT R. MOON

waiver by the defendant occurred. Moreover, even if the defendant had such a choice, he must be the one to make it, not his attorney. "Inasmuch as this right is anchored to the United States Constitution, it cannot be waived by one other than the accused." United States v. Rich, 589 F.2d 1025, 1032 (10th Cir. 1978). Here, even if the conversation among the lawyers concerning whether a consolidation would be agreeable to the defendant could be equated with a formal motion -- and we hold that it cannot -- the record is silent concerning the defendant's knowledge of this discussion or that he assented to it or knew its import. There simply is no waiver of the defendant's double jeopardy rights under these facts.

B. Should the Prosecution of the Defendant for Murder Be Dismissed Because it Violates the Constitutional Protection against Double Jeopardy?

At the outset we should say that, because the federal and state constitutional provisions do not significantly differ, we will use the same standard to analyze both provisions. See State v. Herrera-Rodriguez, 164 Ariz. 49, 51-52, 790 P.2d 747, 749-50 (App. 1989), petition for review granted, May 24, 1990 (the similarity of language of the due process clauses in the federal and state constitutions suggests the use of a similar standard).

The constitutional double jeopardy provisions protect against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same

offense. Grady v. Corbin, 495 U.S. ___, ___, 110 S. Ct. 2084, 2090, 109 L. Ed. 2d 548 (1990) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969)); State v. Rumsey, 136 Ariz. 166, 168, 665 P.2d 48, 50 (1983), aff'd, 467 U.S. 203 (1984). We are concerned only with the second situation.

The reasoning behind the constitutional protection is multiple: The protection is based on the idea that the state, with all its resources and power, should not be allowed to make repeated attempts to convict. Rumsey, 136 Ariz. at 168-69, 665 P.2d at 50-51 (quoting Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). Such repeated attempts to convict give the state the opportunity to hone the manner in which it will present its proof in order to give it the greatest impact.

See Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218, 72 L. Ed. 2d 652 (1982). Even when multiple prosecutions are permitted, such prosecutions place an additional burden upon a defendant to face the charges one at a time. See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932).

The Blockburger test deals principally with the "identical elements" idea. When the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. Id. If one provision requires proof of an additional fact, which the other does not, the offenses are not the same. Id. This is true even though the proof required to establish the element

overlaps in both charges. Iannelli v. United States, 420 U.S. 770, 785 n. 17, 95 S. Ct. 1284, 1293-94 n. 17, 43 L. Ed. 2d 616 (1975). See also Illinois v. Vitale, 447 U.S. 410, 416 n. 6, 100 S. Ct. 2260, 2265 n. 6, 65 L. Ed. 2d 228 (1980).

Yet, in dealing with multiple prosecutions, the Blockburger test is not the exclusive one. As the Court said in Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977):

> The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970), where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was

> not present at the robbery, the Court held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims. And in In re Nielsen, 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672 (1889), the Court held that a conviction of a Mormon on a charge of cohabiting with his two wives over a 2 1/2-year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period.
>
> In both cases, strict application of the Blockburger test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. . . .

Id. at 166 n. 6.

In Grady v. Corbin, the defendant, the driver of a car involved in an accident in which the driver of another car was killed, pled guilty to driving while intoxicated and failing to keep right of the median. 110 S. Ct. at 2087-89. The Supreme Court held that he could not later be prosecuted for manslaughter and

assault charges arising out of the same accident because the subsequent prosecution would violate the defendant's constitutional double jeopardy right. 110 S. Ct. at 2094. In Grady, the Court recognized that the double jeopardy principle goes beyond the mechanical "identical element" analysis to include identical conduct. 110 S. Ct. at 2093. Under Grady, a subsequent prosecution is unconstitutional if, in order to establish an element of an offense, the prosecution must prove conduct that constitutes an offense for which the defendant already has been prosecuted. Id. Arizona seems to have approved the Grady rationale. See Taylor v. Sherrill, ___ Ariz. ___, ___, 802 P.2d 1058, ___ (1990); Hovey v. Superior Court, 165 Ariz. 278, 281, 798 P.2d 416, 419 (App. 1990).

We should carefully distinguish between proving the same conduct in two prosecutions and using the same evidence in two prosecutions. The rule in Grady does not prohibit the prosecutor from introducing the same evidence in the second prosecution that was used in the first prosecution. Grady, 110 S. Ct. at 2093. See Dowling v. United States, 493 U.S. ___, ___, 110 S. Ct. 668, 675, 107 L. Ed. 2d 708 (1990). However, if, as here, the second prosecution is dependent on the same conduct as the earlier prosecution, double jeopardy occurs. Grady v. Corbin, 495 U.S. at ___, 110 S. Ct. at 2094. See also United States v. Esposito, 912 F.2d 60, 64-65 (3d Cir. 1990), cert. dismissed, No. 90-724 (1991).

In this case, the conduct to be proved in the second prosecution is the identical conduct proved in the first.

The conduct upon which the state based its prosecution of the defendant for kidnapping was that the defendant took the child against her will with the intent to kill her. The prosecution of the defendant for first degree murder pursuant to A.R.S. § 13-1105 would require proof of exactly the same conduct. However, as the Court in Grady pointed out, if the state has other conduct proving the murder which is different from the conduct proved in the kidnapping case, and which would satisfy the elements of first degree murder, the kidnapping conviction would not bar the subsequent prosecution. Grady v. Corbin, 495 U.S. at ___, 110 S. Ct. at 2094. The state has not only shown that it will rely on different conduct to prove that the defendant murdered Rebecca Lanning; it has conceded that it will not. —

The state claims that the kidnapping evidence could be used to prove identity, motive, opportunity, or completion of the story of the crime under Rule 404(b) of the Arizona Rules of Evidence, and that this use is permissible under Dowling. In Dowling, the defendant had been charged with armed robbery. Dowling v. United States, 493 U.S. at ___, 110 S. Ct. at 670. The government sought to introduce evidence under Rule 404(b) of the Federal Rules of Evidence that the defendant had been involved in another robbery two weeks after the robbery which was the subject of the present prosecution. Id. The Court held that the defendant's acquittal of the other robbery charge did not prevent the use of the same evidence to prove his identity in the second trial for a different robbery. Id. at ___, 110 S. Ct. at 675. The issue here is totally different.

Here, both prosecutions focus on the same conduct arising out of the same incident. Evidence of the kidnapping would not be offered to show identity of the defendant, but rather to show the murder of Rebecca Lanning by the defendant. Dowling does not apply.

Finally, the state requests that if we feel that Grady dictates that double jeopardy applies to prevent the subsequent prosecution of the defendant, that the dismissal be without prejudice. It is our understanding that the defendant has appealed his kidnapping and custodial interference conviction. If he is successful in that endeavor and the matter is sent back to the trial court for a new trial, the state may wish to try the murder case rather than the kidnapping case. They should have that choice if it is available to them.

The relief requested is hereby granted, except that the trial court is directed to dismiss the pending prosecution without prejudice.

/S/
JOHN L. CLABORNE, Judge

CONCURRING:

/S/
EDWARD C. VOSS
Presiding Judge, Department E

/S/
NOEL FIDEL, Judge

APPENDIX B

[Dated September 13, 1991]

Supreme Court

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NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

September 13, 1991

RE: TIMOTHY PRICE QUINTON vs. SUP CT
MOHAVE CO-HON. LEONARD C. LANGFORD/
WILLIAM J. EKSTROM
Supreme Court No. CV-91-0142-PR
Court of Appeals No. 1 CA-SA 90-224
Mohave County No. CR-11525

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 12, 1991, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 13th day of September, 1991.

NOEL K. DESSAINT, Clerk

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